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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1915.

No. [redacted] 375

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error.

vs.

JAMES B. WILSON,
Defendant in Error.

In Error to the Appellate Court, First District, State of Illinois.

Reply to Suggestions of Plaintiff in Error in Opposition to Motion to Dismiss or Affirm.

MORSE IVES,
Attorney for Defendant in Error.

CHAMPLIN LAW PRINTING CO.

IN THE

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Although it does not appear in the record in this case, plaintiff in error presents in its suggestions (p. 2), an argument or statement made by counsel for the defendant in error in reply to the petition for certiorari in the Supreme Court of Illinois which is inconsistent with defendant in error's present contention. At that time counsel for defendant in error shared the misapprehension of counsel for plaintiff in error and assumed that the character of the case and the condition of the record was such as to permit a review thereof by this court, but afterward the opinion in *Stratton* v. *Stratton*, 239 U. S. 55, appeared in the Lawyers' Edition, Advance Sheets of the Opinions of this Court, dated Decem-

ber 15, 1915, and an examination of the record with that case and the decisions therein cited in mind compelled a different conclusion.

It is not contended that the matter thus presented has any legal relevancy, for it must be conceded that the jurisdiction of this court cannot be conferred by waiver, estoppel or even express agreement.

Plaintiff in error does not now claim that the Appellate Court below was the highest court of the state in which a decision in this suit could have been had. It merely contends in the language of *Soden* v. *Claney,* 269 Ill. 98 (plaintiff in error's suggestions, p. 22), that the judgment of the Appellate Court is *final.* The judgment of the Appellate Court, however, in any such case is *final,* even if the defeated party there fails to take any step to have the case reviewed in the Supreme Court of the state.

The only other conclusion that might be suggested by the decision cited is that the denial of the petition for certiorari is an approval of the decision reached by the Appellate Court, "and is therefore in effect an affirmance of the judgment," and that therefore this case has been decided in the Supreme Court of the state and the writ of error to the Appellate Court for that reason should be dismissed. But this court, in the case of *Norfolk & Suburban Turnpike Company* v. *Virginia,* 225 U. S. 264, "for the guidance of suitors," laid down the following rule (p. 269):

> "Where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a state declining to allow a writ of

> error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the case upon the merits, we shall consider ourselves constrained to apply the rule announced in the *Crovo* case, and shall therefore, by not departing from the face of the record, solve against jurisdiction the ambiguity created by the form in which the state court has expressed its action."

The Supreme Court of Appeals of Virginia in the above entitled cause, it appears (p. 266), "being of opinion that the said judgment or order is plainly right, * * * refused a writ of error, thereby affirming said judgment of said Circuit Court of Princess Ann county of Virginia."

Turning to the petition for certiorari to the Supreme Court of Illinois in this case (Trans. 185), it appears that the plaintiff in error sought a decision of the Supreme Court of Illinois, "and to the end that such decision may be obtained, your petitioner prays that a writ of certiorari be granted," and in response to this petition the Supreme Court of Illinois entered the following order (Trans. 175):

> "And now on this day, the court having duly considered the petition for a writ of certiorari herein, as well as the record, abstract, brief and arguments filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a writ of certiorari herein."

Therefore, we claim, the writ of error here should be dismissed, not because it is directed to the Ap-

pellate Court instead of the Supreme Court, but because the defendant in error did not take a step which it might have taken to have made the decision of the Appellate Court the decision of the highest court of the state in which a decision in the suit could be had.

II.

NO FEDERAL QUESTION, SUBSTANTIAL AND NOT FRIVOLOUS, HAS BEEN RESERVED FOR REVIEW.

The plaintiff in error makes no reply to the respective contentions of the defendant in error in this regard other than to in substance reassert (Plaintiff in error's suggestions, p. 23) its assignments of error.

1. It claims to have preserved for review the scope, meaning and application of the hours-of-service act by a requested peremptory instruction (Assignment of Error 5; Trans. 188) covering all of the counts of the declaration; although it does not claim, and there is no room for the claim, that the case should not have gone to the jury on the second count.

2. It claims to have preserved the same question for review "by a separate request for a peremptory instruction on each separate count of the declaration." Yet no error is assigned in this court upon the refusal of any one of these instructions; and if assigned, it would not avail, for the reasons stated concerning assignment 6 (Original Suggestions, pp. 11, 12).

3. It makes the same claim, "by the tendering and refusal of an instruction that the admitted facts showed no violation of the federal hours-of-service act" (Assignment 6), when, "at the same time" (Trans. 158; Rec. 328), it submitted by other instructions requested by it (Trans. 157) the same question as one of fact for the jury (Original Suggestions, pp. 11, 12).

4. It states that it preserved the same question for review "by the giving of plaintiff's instructions 1 and 2, which authorized the jury to disregard the defenses of contributory negligence and assumed risk." It assigns no error upon the giving of instruction No. 2. It did not point out in the trial or in the Appellate Court below, specifically or otherwise, anything as erroneous or improper in instruction No. 1. And further, in the respect of which it now complains of instruction No. 1, the instruction is in conformity with its own ideas given to the jury at its request by instructions 16, 19 and 20.

III.

THE UNDISPUTED FACTS IN THIS CASE ESTABLISH NOT ONLY LIABILITY UNDER THE SECOND COUNT OF PLAINTIFF'S DECLARATION, BUT, AS CONTRIBUTING TO PLAINTIFF'S INJURY, A FLAGRANT VIOLATION OF THE SIXTEEN HOUR LAW.

The plaintiff in error claims (Suggestions, p. 25) that the defendant in error is precluded from urging his right to recover, under all the evidence in (a limitation that was induced by the defendant), the case, because of the limitation of the trial court

and because no cross-errors having been assigned by defendant in error. In this plaintiff in error overlooks the assignment of cross-errors in the Appellate Court (Trans. 162; Rec. 339). Plaintiff in error asserts (p. 25) that the injury occurred more than sixteen hours after the last violation of the law and yet presents no reason, if the last violation so incapacitated the defendant that at the time he was set to work again he was incapable of caring for himself and was injured thereby, why it should be relieved from responsibility. It in no respect responds to the idea that there is no relationship in the statute between periods of employment in excess of sixteen hours and ten hours' rest.

In its suggestions (p. 4-20), plaintiff in error makes certain contentions without direct reference to the errors assigned. It says (p. 5) the second count "contains no averment that the plaintiff was in the exercise of ordinary care prior to the time of his injury; and under this count the meaning and application of the hours-of-service act is necessarily involved, because the omission from this count of any averment of the exercise of care by plaintiff must be considered in connection with plaintiff's first and second instructions." Under the statute, however, contributory negligence is a matter of defense (*Central Vt. Railroad Company* v. *White,* 238 U. S. 507, 512); and plaintiff's first instruction (Trans. 152, 153) pertains only to the hours-of-service counts, and the second instruction (Trans. 154, 155), informs the jury as to the provisions of the Employers' Lia-

bility Act, pertinent under all the evidence in the case.

In its suggestions (p. 6), plaintiff in error states that it specially requested the court to give instruction No. 27; whereas it appears from the record (Trans. 157, 158) that this instruction was not specially requested, but was tendered at the same time with its other instructions, inconsistent therewith, in that they presented the matter of the violation of the sixteen-hour law and its proximate connection with plaintiff's injury as a question of fact to the jury.

Plaintiff in error suggests (p. 9) that the doctrine of assumed risk precludes recovery in this case, unless that doctrine is removed from the case, because "the violation of a statute enacted for the safety of employes contributed to the injury." This is plainly untenable, because by the evidence in support of the second count of the declaration it appears that Wilson had no knowledge of the dangerous proximity of the tracks which contributed to his injury.

Plaintiff in error cites the case of *St. L., I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S. 265 (its suggestions, 14, 15). In that case there was no evidence to show an exhausted condition of the plaintiff, and no connection shown between the violation of the sixteen-hour law and the plaintiff's injury; whereas here, plaintiff in error states (its suggestions, p. 10) the "proximate connection between his injury and his unfitness for duty (known to Wilson and not communicated to his employer)

is clearly established by the following testimony of the plaintiff."

Plaintiff in error cites (its suggestions, 19) the cases of *Schweig* v. *C. M. & St. P. Ry. Co.*, 216 Fed. Rep. 750, and *Smith* v. *A. T. & S. F. Ry. Co.*, 87 S. W. Rep. 1052, 1057. These cases have no relevancy here, because in each of those cases the exhausted condition was a necessary requisite in the claimed right to recover, although neither case was within any statute giving such right on such ground. In the instant case, however, it was a question for the jury to say under the 2nd count, whether the dangerous proximity of the tracks was the sole cause of plaintiff's injury, or whether his exhausted condition did or did not contribute thereto; and under the hours-of-service counts his exhausted condition was relevant bearing upon the connection between the violation of the statute and his injury.

Plaintiff in error's contentions are best answered by simply applying them to facts. A conductor may be constantly employed for days in violation of the law, without sleep, and employed to the extent that he becomes physically and mentally incapacitated and if then he be given 10 hours off duty, he may again be placed in charge of a train and though still incapacitated and a constant source of danger to passengers, employes and property, injuries to any of these may not be charged to the law's violation. Again, if after days of constant work that conductor be specially ordered to ride for 10 hours on a freight train upon which there is no place for him to sleep, to a destination from which he is to take out his next train,

during such 10 hours' ride, although under pay, he is "off duty," and his employer's immunity is supplied. On and off duty means but a change in the character of employment.

These contentions are foreclosed in *M. K. & T. Ry. Co.* v. *U. S.*, 231 U. S. 112, 119; *B. & O. R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612, 619.

We submit that there is no contention of plaintiff in error in this case relevant either to the matter of this court's jurisdiction or to the merits of the case that is not frivolous. We therefore ask that the writ of error be dismissed or that the judgment be affirmed.

Respectfully submitted,

MORSE IVES,
Attorney for Defendant in Error.

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(b) The Illinois Supreme Court has decided that upon denial of writ of certiorari the decision of the Appellate Court is final..... 22

II. The following substantial and important Federal questions have been duly preserved for review:

(a) May a trainman engaged in interstate commerce and injured by reason of his exhausted condition brought about by having on a previous occasion been permitted to remain on duty in violation of the Hours of Service Act, where such exhausted condition was known to him, but unknown to his employer, recover for such injury, if, at the time of receiving same, his being on duty was not a violation of the Act?..... 23

(b) May a violation of the Hours of Service Act as to time "on duty" antecedent to the period of service on which an injury was received and separated from it by a longer period of time "off duty" than the Hours of Service Act requires, be held to be the proximate cause of such injury?..... 23

(c) May an interstate carrier permit an employee, who has been on duty continuously for more than sixteen hours, again to go on duty after having had more than ten consecutive hours off duty, when any disability to which said employee may then be subject by reason of having, on the previous trip, been on duty more than sixteen hours, is unknown to the employer?..... 24

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(e) In such a case, may the courts submit to juries the question whether the ten consecutive hours "off duty,"

provided by the Hours of Service Act, was or was not a sufficient length of time to break the causal connection between the antecedent period of overwork and the subsequent injury, where the employer had no knowledge of the employee's exhausted condition when resuming work after the expiration of more than "ten consecutive hours off duty"? 24

III. No violation of the Hours of Service Act occurred later than ten o'clock on the morning of August 22d. The injury occurred more than sixteen hours after the last violation of law and between such violation and the injury was a period "off duty" longer than the "ten consecutive hours" required by the Act. Assumed risk disposes of the case under every count, unless that doctrine was suspended *at the time of the injury*, by a then existent violation of the statute..... 25

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IN THE

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No. 842

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error,

vs.

JAMES B. WILSON,
Defendant in Error.

IN ERROR TO THE APPELLATE COURT, FIRST DISTRICT, STATE OF ILLINOIS.

SUGGESTIONS IN OPPOSITION TO MOTION BY DEFENDANT IN ERROR TO DISMISS OR AFFIRM.

Under Illinois practice all questions of fact are conclusively settled by decision of the Appellate Court. In this case, upon affirmance by the Appellate Court of judgment for $45,000, plaintiff in error, obedient to the statute which precludes consideration by the Illinois Supreme Court of questions of fact, filed its petition for

writ of certiorari (Trans., 176-185) in order to obtain authoritative adjudication of a question of law; viz:

Is plaintiff in error shielded from responsibility by a proper application to undisputed facts of the Federal Hours of Service Act, which was invoked by both pleadings and instructions?

To this petition the same counsel who now files in this court motion to dismiss or affirm, filed in the Supreme Court of Illinois a printed reply which concluded:

"VIII.

JUSTICE DOES NOT DEMAND A REVIEW OF THE RECORD IN THIS CASE BY THREE APPELLATE TRIBUNALS.

There are none but Federal questions in this case. The decision of the Supreme Court of the United States is alone final.

Upon a denial by this court of the petition for certiorari, a writ of error from the United States Supreme Court may be had direct to the Appellate Court for the First District of Illinois (*Chicago, Indianapolis & Louisville Ry.* v. *Hackett,* 228 U. S., 559).

We respectfully submit that the petition for certiorari should be denied."

On December 21, 1915, the Supreme Court of Illinois (Trans., 175) denied writ of certiorari, and in conformity with the mandate of said Supreme Court the Appellate Court made certificate (Trans., 191) that said Appellate Court is the highest court of law or equity of the State of Illinois in which a decision in said cause could be had and entered order allowing writ of error so as to give opportunity to present to this court the Federal questions involved. (Trans., 193.)

Before discussing *seriatim* the points suggested by defendant in error in support of motion to dismiss or af-

firm, we summarize briefly the pleadings and proof sufficiently to enable the court to pass intelligently upon our contention that "hours of service" are fundamentally involved in the question of liability or non-liability herein, that Congress has legislatively prescribed the boundaries wherein "hours of service" shall be made the basis of civil liability, that the State courts have denied to plaintiff in error the protection of the Act of Congress by permitting the jury to overrule the legislatively declared judgment of Congress that a period of "ten consecutive hours off duty" breaks, as matter of law, the causal connection between previous "hours of service" and subsequent injury.

STATEMENT.

The declaration consists of five original counts (Trans., 2-11), and one additional count. (Trans., 13-15.) All allege the engagement of defendant in interstate commerce and the employment of plaintiff as a freight conductor in such commerce. All predicate liability upon the Federal Employers' Liability Act of April 22, 1908 (35 Stat. at L., 65, Chap. 149, U. S. Comp. Stat. Supp., 1911, p. 1322), as amended April 5, 1910 (35 Stat. at L., 291, Chap. 143, U. S. Comp. Stat. Supp. 1911, p. 1324).

The first and third counts were taken from the consideration of the jury by peremptory instructions. Of the four remaining counts, three set out in minute detail the alleged exact hours when plaintiff went on and off duty on the 19th, 20th, 21st, 22d and 23d days of August, 1913, averring violation of the Federal Hours of Service Act, "so that (Trans., 14) by reason of the several violations of law by the defendant as aforesaid the plaintiff became nervous and exhausted, his senses became dulled and his judgment impaired, and while he was in this condition, shortly after midnight, and on the 23rd day of August, 1913, he was required and permitted by the defendant to take charge of a freight train bound from Cleveland, Ohio, to and through New Castle Junction, Pennsylvania, and the plaintiff took charge of said train and ran said train on said trip as far as Peninsula, Ohio, and said train was there brought to a standstill upon the main track there, and the plaintiff caused an engine to be detached from said train and caused said engine to back in and along a sidetrack there for the purpose of proceeding to the other end of said train and for the purpose of detaching a car from said train; that said side-

track was next to and adjoining the said main track upon which said train was then and there standing; that as said engine backed along said sidetrack the plaintiff rode upon the footboard at the rear of the tender of said engine and on the end of said footboard nearest the said train, and that as said engine approached upon said sidetrack near to the car of said train which the plaintiff was about to detach therefrom, the plaintiff then and there, by reason of the several violations of law of the defendant, aforesaid, and *by reason of his nervous and exhausted condition as aforesaid, was unable to protect himself from injury there* (italics ours), and he stepped off from said footboard of said engine towards said train and between said main track and said sidetrack, and he then and there struck against one of the cars of said train and was thrown against and under said moving engine, and as a direct result of the several violations of law of the defendant aforesaid he was then and there by reason of the premises greatly injured," etc.

One count (the second) makes no reference to "hours on duty" by plaintiff antecedent to the trip on which he was injured and averred negligence on the part of defendant "in constructing a certain sidetrack there unusually close to said main track." This count, however, contains no averment that plaintiff was in the exercise of ordinary care at or prior to the time of his injury; and under this count the meaning and application of the Hours of Service Act is necessarily involved, because the omission from this count of any averment of the exercise of care by plaintiff must be considered in connection with plaintiff's first and second instructions. (Trans., 152-154.)

By the first instruction given on behalf of plaintiff, the jury were advised that they should not consider plaintiff's contributory negligence on the morning of

August 23d either to defeat or diminish damages, if the jury found that a violation of the Hours of Service Act "in the forenoon of August 22nd, 1913" proximately caused the injury to plaintiff on a trip which he was permitted by the defendant to undertake "shortly after midnight, on the 23d day of August, 1913." (Trans., 14.)

By the second instruction given on behalf of plaintiff the jury were advised that an "employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury of such employe," the jury having already been advised by plaintiff's first instruction that the Hours of Service Act was "enacted for the safety of employes of common carriers." (Trans., 152.)

In addition to tendering and requesting the court to give a peremptory instruction as to the entire declaration, defendant, upon denial by the court of this request, tendered separate peremptory instructions as to each count of the declaration and specifically requested the court to give the following instruction which was refused (Trans., 158):

> "The court instructs the jury that there is no evidence in the case that any violation of the hours of service law proximately caused or contributed to the injuries for which this suit is brought; and you are therefore instructed that you cannot find the defendant guilty because or on account of the character or length of service in which plaintiff was engaged at and prior to his injury."

Plaintiff was injured at about two o'clock on the morning of August 23, 1913, while in charge, as conductor, of a freight train for which he was "called" at ten o'clock on the night of August 22d, having reported for duty, in response to such call, at about midnight, and hav-

ing left the terminal (Cleveland) at which he was thus called at 12:30 A. M. on August 23d. In other words, at the time of his injury, he had been "actually engaged in or connected with the movement of the train" on which he was injured about two hours.

The last time Wilson had previously been "actually engaged in or connected with the movement of any train" was 10:00 A. M. on the morning of August 22d. On the morning of August 22d, he had been relieved at Warwick of a train which had been under his charge, as conductor, for some fourteen or sixteen hours. Plaintiff testified that he was not actually relieved until 10:00 A. M. on the morning of August 22d, in which event his time on duty would be sixteen hours and thirty minutes. However, he admitted that he had recorded in his timebook the time of his relief at Warwick as 8:45 A. M. and had so reported to the company. The engineer who was relieved with plaintiff fixed the time of relief at 8:45; and the conductor who relieved him testified to 8:45 as the hour of relief, and produced his original entry made at the time. Train sheets of defendant, made up by the train dispatcher from telegraphic reports, also showed the hour of relief as 8:45 A. M.; but if, in fact, relief was not given until 10:00 A. M. on the morning of August 22d, Wilson was not, in the language of the Hours of Service Act, "permitted again to go on duty," and was not again "engaged in or connected with the movement of any train," until he reported about midnight and took charge of the train which left Cleveland at 12:30 on the morning of August 23d—*i. e.*, no matter whether the relief was shortly before or shortly after the expiration of sixteen continuous hours on duty, Wilson was (again in the language of the act) "relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty."

Notwithstanding the uncontroverted fact that for at least fourteen hours before going on duty on the trip on which he was injured, Wilson was not "engaged in or connected with the movement of any train" the court permitted the jury to speculate or conjecture whether there was proximate connection between the fact "that the defendant required or permitted the plaintiff from a time during the afternoon of August 21st, 1913, until a time in the forenoon of August 22d, 1913, for a period of more than sixteen consecutive hours, to work and be actually engaged in or connected with the movement of train" (plaintiff's instruction 1; Trans., 153), and the fact that plaintiff was injured upon a trip which began shortly after midnight on the 23d day of August, 1913, when he was "required and permitted by the defendant to take charge of a freight train." (Plaintiff's declaration, Trans., 14.) In other words, the jury were permitted to decide that a period of fourteen hours during which plaintiff was "relieved and not required or permitted again to go on duty" was not sufficient, *in view of all the facts and circumstances developed before the jury,* to comply with the requirements of the statute which (as interpreted by the court below and by the attorney for defendant in error) fixes merely a *minimum* period of relief (suggestions of defendant in error, p. 14), but leaves to the fluctuating judgment of different courts and juries the right to determine the extent to which such minimum period should be enlarged because of facts and circumstances peculiar to individual cases.

According to the ruling of the court below and the contention of counsel for defendant in error here, when a jury has decided, in view of the particular circumstances of an individual case that fourteen hours "off duty" is not sufficient to meet the requirements of the statute, the defendant (plaintiff's instructions 1 and 2;

Trans., 152-154) cannot set up either contributory negligence or assumption of risk, although plaintiff is fully aware of his inability to exercise care commensurate with the hazards of his occupation and does not reveal such disability to his employer, who has no knowledge thereof.

By the construction given by the lower court to the Hours of Service Act—*i. e.*, that such act fixes ten hours as the *minimum* time "off duty" after sixteen hours of continuous service, and then expands elastically to cover and include any additional number of hours which different juries may think particular situations require—the provision of the Federal Employers' Liability Act that an "employe shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury of such employe" is made coextensive with any situation which has given an employe what the jury considers insufficient time "off duty." Thus to permit a jury, in the exercise of its judgment and discretion, to extend a statute so as to eliminate a common law defense, destroys the manifest purpose of Congress to preserve assumption of risk as a common law defense to common law liability.

The doctrine of assumed risk precludes recovery in this case, unless that doctrine is removed from the case because "the violation of a statute enacted for the safety of employes contributed to the injury." Not only does the declaration proceed on the theory that Wilson's disability and unfitness to perform his work (known to him and undisclosed to defendant) at the time he reported for duty at midnight on August 23d, was a proximate cause of his injury (*e. g.*, the declaration charges that plaintiff "*by reason of his nervous and exhausted condition as*

aforesaid, was unable to protect himself from injury there, and he stepped off of said footboard of said engine towards said train and between said main track and said sidetrack, and he then and there struck against one of the cars of said train and was thrown against and under said moving engine"), but this proximate connection between his injury and his unfitness for duty (known to Wilson and not communicated to his employer) is clearly established by the following testimony of plaintiff (Trans., 39):

"Direct Examination.

Q. What was your condition at that time, Mr. Wilson, that is, between the time you were called and the time you left Cleveland that night?

A. I was awful sleepy and tired.

Q. Was there anything there in the yard that night that called your attention to your condition?

A. Yes, sir.

Q. What was it?

A. When I was coming from the caboose down to the yard office the head brakeman and I were walking along between the train I had in there and another one that they had brought in later, between the two tracks, and we were walking along there, and I stumbled and bumped into the side of a car in the train I brought in, and it woke me up. I had been dozing and walking along there.

Q. And after you left Cleveland did you do anything in connection with your train there?

A. Yes, sir.

Q. What did you do?

A. I had my book with the numbers of the cars on. The wheel report did not have any numbers on it. I was trying to copy the numbers off the book on to the wheel report, and when I would look down at the book to get the numbers, it looked as though there was two numbers. I couldn't get them. It was double. I had a meet order for an extra.

Q. What do you mean by a "meet" order?

A. A meet order to meet an extra train coming in the opposite direction, and I knew I didn't dare

to sit there or I would go to sleep. I had to keep awake.

Q. Did you fill out your report?

A. No, sir; I couldn't finish it. I started to do so when I was marking the report down, and I couldn't keep awake, and I went and rode on the rear platform of the caboose. (Trans., 41.)

Q. What was your condition—that is, when you were riding north on that running board?

A. I was awful sleepy and tired.

Q. Was there anything at that time that called your attention to your condition?

A. Yes, sir.

Q. What was it?

A. I could see the tail light on the rear end of the caboose. It was green. From the direction I was looking at it, I looked at it and it looked like two lights, staggery-like, like two lights, and I knew there was only one. My eyes seemed blurred. I felt I could lay right down on that footboard and go to sleep.

Cross-Examination (Trans., 63).

Q. Now, you observed, I believe you said, that after you were called that night and on your way down, before you took charge of the train, that you stumbled or bumped against some other cars on the way down?

A. I bumped up against the car, run into the side of the cars.

Q. That was on your way down to the round-house?

A. That was on my way down to the yard office.

Q. To the yard office? And that was the time that you noticed that you were sleepy also?

A. Yes, sir.

Q. That was before you had registered out or taken any train at all?

A. That was after I was called. That was while I was going down.

Q. After you were called and on your way down to the yard office?

A. Yes, sir.

Q. Who did you see at the yard office when you got down there?

A. I saw the yardmaster.
Q. Saw the yardmaster?
A. And the clerk.
Q. And the clerk? Did you say to either of them anything about the fact that you were sleepy?
A. No, sir.
Q. Did you say to either of them that you had found yourself staggering and bumping against cars on the way down?
A. No, sir.
Q. Did you intimate to either of them that you thought you were not in a fit condition to take care of a train?
A. I asked the yardmaster for a pilot, that was all.
Q. For a pilot?
A. Yes, sir.
Q. You told him nothing about feeling tired nor sleepy?
A. I did not.
Q. Told him nothing about having stumbled even?
A. No, sir.
(Trans., 70):
Q. You do not know whether you struck the side of this car or did not strike it, do you?
A. No, sir.
Q. You do not know whether you slipped or stumbled, do you, you have no knowledge as to that?
A. I know I did not slip or stumble.
Q. What is it?
A. Off of the footboard.
Q. No, but on the ground?
A. I do not remember after that.
Q. Your last recollection is at the time that you stepped down?
A. Off the footboard.
Q. Did you step with your left or right foot first?
A. I stepped with my left.
Q. With your left foot. And at that time do you remember whether you had your lantern in your left or right hand?
A. I do not.
Q. You have no recollection of whether that foot ever reached the ground or not?

A. I have not.
Q. Both feet had not left the footboard at the time that you last remember what took place?
A. I don't know.
Q. Whether you fell asleep there at that time or not, you don't know?
A. I don't know."

Much of the record and much of defendant in error's statement in this court are taken up with a detailed recital of Wilson's work from August 19th to the date of the accident—just when he was called on different dates—just what runs he made—just when and where he was relieved—just what he did while "off duty" as well as while "on duty" during this period—what part of his compensated time was made up of deadheading, *i. e.*, riding as a passenger, under pay, but having no duty or responsibility in connection with the movement of any train.

All these details, we believe, can only be appropriately discussed in a brief upon the merits; and our statement of the pleadings and of the testimony, in these suggestions, is intended merely to meet the allegation of defendant in error's motion "that the plaintiff in error reserved no federal questions for review, and that its respective contentions are foreclosed by previous decisions of this court and are frivolous."

We submit that the proper construction and interpretation of the Hours of Service Act and the proper application of its provisions to an undisputed state of facts are clearly preserved for review by this court, and that the following contentions arising under said act are neither frivolous nor foreclosed by any decision of this court, viz:

I.

By the Hours of Service Act Congress has legislatively determined the boundaries of the employer's liability for injuries caused by permitting employees to be on duty an excessive number of hours.

The rule with reference to the Hours of Service Act must be the same as the one laid down with reference to the Employers' Liability Act, and which has been correctly summarized by the Illinois Supreme Court (*Staley* v. *I. C. R. R. Co.*, 268 Ill., 356) in the following language:

> "The Federal Employers' Liability Act has taken possession of—has occupied—that field for the purpose of calling into play therein this exclusive power of the Federal government. Necessarily, all common or statute law of this state on that subject has been superseded. The field of liability as to employees injured while engaged in interstate commerce on railroads is occupied exclusively by the Federal Employers' Liability Act, and that, too, regardless of the negligence or lack of negligence of either party to the litigation."

II.

Under the Federal Hours of Service Act, as authoritatively interpreted by this court, a proximate relationship must be established between the injuries and the violation of the law, even where, at the time of the injury, the very fact of claimant being then on duty is violative of the law.

In *St. L., I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S., 265, this court, speaking through Chief Justice White, said:

> "The Hours of Service Act was approved March 4, 1907, and is entitled 'An Act to Promote the Safety of Employees and Travelers Upon Railroads by Limiting the Hours of Service of Employees Thereon.'

We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers, which the view taken of the act by the court below imposes. We say this, because, although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employees to work beyond the statutory time to liability for all accidents happening during such period, without reference to whether the accident was attributable to the act of working overtime. And we think that where no such liability is expressed in the statute, it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that, where negligence is charged to justify a recovery, it must be shown that the alleged negligence was the proximate cause of the damage."

III.

By such act Congress has provided,—*i. e.*, legislatively determined—that "whenever any such employe of such common carrier shall have been continuously on duty for sixteen hours, he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty."

By this provision, as we contend, resumption of duty by an employe who has been on duty beyond the statutory time is specifically authorized whenever, following service of more than sixteen hours, the employe has been given "ten consecutive hours off duty."

Recovery was permitted in the court below, upon the theory that a period of overwork terminating "in the forenoon of August 22nd, 1913," (plaintiff's instruction 1, Trans., 153) brought about a condition of exhaustion which rendered Wilson unfit to resume duty *more than*

fourteen hours after the termination of this period of overwork. If causing or permitting Wilson to go to work shortly after midnight on the morning of August 23, 1913, may properly be held by a jury to be a violation of the Hours of Service Act, and thereby eliminate from the case the defense of assumed risk (Trans., 154), it would seem that counsel for defendant in error, to be consistent, must claim that the railroad company could have been prosecuted and penalty recovered under Section 3 of the act for causing or permitting defendant in error to be in charge of the train at the time he was injured. The construction contended for by counsel for defendant in error and adopted by the court below by the first instruction given on behalf of plaintiff would eliminate all definiteness and certainty as to the time when previously overworked employees might again be permitted to resume their duties, and make liability or non-liability for criminal penalties hinge upon the varying recuperative characteristics of different employees.

IV.

Since Congress has undertaken to make provision for the resumption of duty by employes who have been previously overworked, the purpose of this provision would be defeated if carriers were to be made liable (either for damages or statutory penalty) because or on account of having permitted an employe "again to go on duty" after the lapse of the statutory period.

The statute, as we contend, covers two subjects: viz., time "on duty" and time "off duty" and provides penalties for a specified unreasonably long period "on duty," and likewise for a specified unreasonably short period "off duty." When Wilson was relieved on the morning

of August 22, any offense with reference to time "on duty" ceased—its continuity ended—liability (whether civil or criminal) for *that* offense became fixed as of the time of such relief. From that moment the operative provision of the statute, *as to future occurrences* was the one pertaining to Wilson being "permitted again to go on duty." With the ending of the violation as to time "on duty," immediately the statutory provision as to time "off duty" measured *future* duty and *future* liability as completely and exclusively as *past* duty and *past* liability were measured by the offense whose continuity was ended when Wilson was relieved.

With continuity of the offense as to time "on duty" ended by the act of relief, with a statutory obligation covering time "off duty" designed to cover *future* conduct and *future* liability, Congress has specifically defined the length of time which breaks the relationship of cause and effect between previous overwork and subsequent injury.

V.

Because the statute covers every moment in which an employe is "actually engaged in or connected with the movement of any train"—either by its requirement as to time "on duty" or its requirement as to time "off duty" antecedent to being thus "actually engaged in or connected with the movement of any train"—the statute must be violated *at the time of an injury* to justify the claim that the violation of the statute is the proximate cause of the injury.

Nevertheless by plaintiff's instruction 1 the court permitted the jury (and the jury exercised the permission given) to overrule the legislatively declared judgment of Congress that ten hours "off duty" is a legally sufficient

intervention to break the causal connection between previous overwork and subsequent injury.

By thus being permitted to hold that a violation of the statute "from a time during the afternoon of August 21, 1913, until a time in the forenoon of August 22, 1913," (plaintiff's instruction 1, Trans., 153) proximately contributed to an injury which occurred on August 23d, contributory negligence was eliminated from the case by plaintiff's instruction 1, and assumed risk was eliminated by plaintiff's instruction 2.

VI.

If, as above pointed out, defendant did not violate the Hours of Service Act by permitting Wilson "again to go on duty" at midnight on August 23d, then no violation of a statute suspended the doctrine of assumed risk, under which plaintiff's disability to perform the duty of his dangerous occupation with a degree of care commensurate with the hazard of that occupation, and which disability was known to him and not communicated to his employer, defeats recovery.

There being no question that "a condition of exhaustion contributed to the accident" (Appellate Court opinion, Trans., 187), that his unfitness for work was fully known to Wilson and was not communicated to any representative of defendant, the peremptory instruction should have been given as to every count of the declaration. The risk and hazard of "again going on duty" in the condition which Wilson so clearly understood and so accurately describes, was voluntarily assumed, as a matter of law, and the legal consequence of such assumption can be escaped only upon one condition, viz., that the statute forbade this assumption of risk by forbidding that he be

permitted "again to go on duty" at the time in question; and that condition is wholly lacking in the case at bar.

In *Schweig* v. *C., M. & St. P. Ry. Co.*, 216 Fed. Rep., 750, the Circuit Court of Appeals for the Eighth Circuit held (752):

> "Plaintiff in error claims that Schweig fell from the engine by reason of being in a tired and exhausted condition, although there is no direct evidence that this was so, and it was very doubtful whether there was sufficient evidence to go to the jury upon this subject. (*St. L., I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S., 265, 33 Sup. Ct., 858; 57 Law Ed., 1179); but we do not determine this question. Looking at the case as presented by the record, regardless of the Hours of Service Act, and treating the case simply as one under the Employers' Liability Law (35 Stat., 65), it is clear that Schweig assumed the risk of injury by reason of the continuous hours of service, as he knew better than anybody else his own condition and as to whether he was taking any risks in continuing to work in his then present condition, whatever it was. Therefore the verdict was rightly directed on this view of the case."

In *Smith* v. *A., T. & S. F. Ry. Co.*, 87 S. W. Rep., 1052, 1057, the Court of Appeals of Texas held:

> "He knew his physical condition far better than the railway company could know it, and cannot excuse his carelessness in falling asleep on his engine while it was standing on the main track by the fact that he was requested by the Master Mechanic to take out a train after he had been at work for about seventeen hours."

VII.

That neither courts nor juries have the right to enlarge upon or to take from any of the provisions of the Hours of Service Law, or to decide that ten hours "off duty" does not, in fact, break the causal relationship between antecedent overwork and subsequent injury, would

seem established by the fact that even state legislatures have no such right, although claimed as an exercise of police power.

In *Erie Railroad Company* v. *New York*, 233 U. S., 671; 58 Law Ed., 1149, the question involved was whether the State of New York by legislative enactment could prescribe a different day's work for block system, telegraph and telephone operators and signal men on railroads than the hours prescribed by the Act of March 4, 1907, known as the Federal Hours of Service Act. The court held that the Act of March 4, 1907, had completely covered the whole field relating to hours of labor of railway employes concerned with the movement of trains, and that the rights as well as the duties and responsibilities of carriers subject to that act must be found within the four corners of the act itself. The court says (683):

> "Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the 'hours of service' law of March 4, 1907, *is the judgment of Congress of the extent of the restriction necessary.* (Italics ours.) It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety, and of the cost and burden which the railroad must endure to secure it."

Having briefly summarized the important questions presented by the record as to the proper construction and application of the Hours of Service Law, involving the protection which it gives, as well as the liability which it creates, we take up in order the points advanced by defendant in error to support his motion.

Point I.

The denial by the Illinois Supreme Court of writ of certiorari operates as a final affirmance of the judgment, and thereby the court of last resort of the State of Illinois has denied to plaintiff in error the protection claimed under the Federal Hours of Service Act.

(a) This court will follow the construction placed by the Supreme Court of Illinois upon Section 121, Chapter 110, statutes of Illinois, as to the force, effect and finality of a judgment of the Appellate Court in cases where writ of certiorari has been denied by the Supreme Court.

In *Morley* v. *L. S. & M. S. Ry. Co.*, 146 U. S., 162, it was said:

> "The rule of construction adopted by the highest court of the state, in construing their own constitution, and one of their own statutes in a case not involving any question re-examinable in this court under the twenty-fifth section of the Judiciary Act, must be regarded as conclusive in this court. *Provident Institution for Saving, of Boston* v. *Massachusetts*, 73 U. S., 6 Wall, 611, 630. The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. *Leffingwell* v. *Warren*, 67 U. S., 2 Black, 599, 603. The meaning of a state statute, declared by the highest court of a state, is conclusive upon this court. *Randall* v. *Brigham*, 74 U. S., 7 Wall., 523, 541."

In *M., K. & T. Ry. Co.* v. *McCann*, 174 U. S., 580, 586, the court said:

> "The elementary rule is that this court accepts the interpretation of the statute of a state affixed to it by the court of last resort thereof. *Sioux City Trust Company* v. *Trust Company*, 172 U. S., 642, and authorities there cited."

(b) The Illinois Supreme Court has construed the section of the Illinois statute which is quoted in the suggestions of defendant in error as meaning that a denial by the Supreme Court of a petition for writ of certiorari operates as an affirmance by the Supreme Court of the judgment below:

In the case of *Soden* v. *Claney*, 269 Ill., 98, the court said:

> "By Section 121 of the Practice Act the judgments or decrees of the Appellate Court are made final in all cases except those wherein appeals and writs of error are specifically required by the constitution to be allowed from the Appellate Court to the Supreme Court, or in cases where certificates of importance are allowed by the Appellate Court, or in cases which the Supreme Court may require to be certified to it by *certiorari* or otherwise. The denial by this court of a petition for *certiorari* in a case not required by the constitution to be reviewed by this court and where a certificate of importance has not been issued by the Appellate Court makes the judgment of the Appellate Court in that case final. It does not follow that such a denial of a petition for the writ of *certiorari* is an approval of the reasons upon which the Appellate Court bases its judgment, but it is an approval of the conclusion reached, *and is therefore, in effect, an affirmance of the judgment.* (Italics ours.) * * * The effect of denying Claney's petition for the writ of *certiorari* was to hold that there were no probable grounds for the reversal of the judgment of the Appellate Court, so far as it affected the rights of Claney as a defendant in the original bill. The cross-errors assigned by Claney and the argument based thereon all go to that part of the judgment of the Appellate Court which affects the right of Claney as a defendant in the original bill. *These matters having been finally disposed of* (italics ours) on Claney's petition for certiorari, they will not be further considered."

As to the finality of the judgment of the Appellate Court, where writ of certiorari is denied by the Supreme

Court, see also *Erlinger* v. *St. L. & O'Fallon Ry. Co.*, 245 Ill., 304, and *LaMonte* v. *Kent*, 253 Ill., 330.

Point II.

Federal questions, substantial and important, have been duly preserved for review.

The scope, meaning and application of the Federal Hours of Service Act is clearly preserved for review by the request of defendant for a peremptory instruction on all the counts of the declaration, by a separate request for a peremptory instruction on each separate count of the declaration, by the tendering and refusal of an instruction that the admitted facts showed no violation of the Federal Hours of Service Act, and by the giving of plaintiff's instructions 1 and 2, which authorized the jury to disregard the defenses of contributory negligence and assumed risk, by permitting the jury so to interpret the Federal Hours of Service Act as to enlarge the time "off duty" which that act requires.

Some of these important federal questions (which we ask leave to elaborate by brief and argument, in regular course, in case defendant in error's motion is denied) are:

(a) May a trainman engaged in interstate commerce, and injured by reason of his exhausted condition brought about by his having on a previous occasion been permitted to remain on duty in violation of the Hours of Service Act, where such exhausted condition was known to him, but unknown to his employer, recover for such injuries, if at the time of receiving same, *his being on duty* was not a violation of said act?

(b) May a violation of the Hours of Service Act as to time "on duty" antecedent to the period of service on

which an injury was received and separated from it by a longer period of time "off duty" than the Hours of Service Act requires, be held to be the proximate cause of such injury?

(c) May an interstate carrier permit an employe who has been on duty continuously for more than sixteen hours again to go on duty after having had more than ten consecutive hours off duty, when any disability to which said employe may then be subject by reason of having, on the previous trip, been on duty more than sixteen hours, is unknown to the employer?

(d) In a suit by a trainman engaged in interstate commerce, for injuries received by reason of his exhausted condition, brought about by having been permitted, on a previous trip, to be continuously on duty more than sixteen hours, and where, since the trip on which said violation of the Hours of Service Act occurred, the employe has been given more than ten consecutive hours off duty, may the court eliminate the defenses of contributory negligence and assumed risk by instructing the jury that *the violation on said previous trip* suspends the operation of the doctrines of contributory negligence and assumed risk *on a subsequent trip* on which the injury occurred? (Plaintiff's instructions 1 and 2, Trans., 152-154.)

(e) In such a case, may the court submit to the jury the question whether the "ten consecutive hours off duty" provided by the Hours of Service Act was or was not a sufficient length of time to break the causal connection between the antecedent period of overwork and the subsequent injury, where the employer had no knowledge of the employe's exhausted condition when resuming work after the expiration of more than "ten consecutive hours off duty"?

Point III.

No violation of the Hours of Service Act occurred later than ten o'clock on the morning of August 22d. The injury occurred more than sixteen hours after the last violation of law, and between such violation and the injury was a period "off duty" longer than the "ten consecutive hours" required by the act.

Under Point III defendant in error discusses the nature and character of claimant's work beginning on August 19th, and attempts to treat the period from the morning of August 19th to the morning of August 23d as a continuous eighty-four-hour period of service; but we submit that such a discussion has no appropriate place in the suggestions in support of the pending motion, because, as stated in defendant in error's suggestions (p. 17), the trial court limited "plaintiff's right to recover, if at all, under the charge of a violation of the sixteen hour law, to the single trip from New Castle Junction, Pennsylvania, to Warwick, Ohio, during August 21st and 22d"; and no cross-errors having been assigned by defendant in error (*C. & E. I. R. R. Co.* v. *Heerey,* 203 Ill., 492, 495), the question presented on the present record pertains to the trip described in plaintiff's instruction 1 (Trans., 153), as continuing "from a time during the afternoon of August 21st, 1913, until a time in the forenoon of August 22d, 1913, for a period of more than sixteen consecutive hours."

In these suggestions we do not deem it proper to enter into a detailed discussion of just what plaintiff did from August 19th to the date of the accident, at what hour he was called on different dates, what runs he made, when and where he was relieved, what he did while "off duty" as well as while "on duty," what part of his time was

given up to waiting for trains and in "dead-heading," *i. e.*, riding as a passenger to points where he was to take charge of certain trains.

All such detail, we believe, can only be appropriately set out in a brief, if opportunity to file such brief be given by denial of the pending motion; and in these suggestions we have attempted only to point out the importance of the questions involved, which we submit justify elaboration by brief and argument in regular and orderly course.

We respectfully submit that the motion to dismiss or affirm should be denied.

William R. Calhoun
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George E. Hamilton

Attorneys for Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1915.

No. 375

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error.

vs.

JAMES B. WILSON,
Defendant in Error.

In Error to the Appellate Court of Illinois, First District.

Brief and Argument for Defendant in Error.

MORSE IVES,
Attorney for Defendant in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1915.

No. 842.

THE BALTIMORE & OHIO RAILROAD COMPANY,
Plaintiff in Error.

vs.

JAMES B. WILSON,
Defendant in Error.

In Error to the Appellate Court of Illinois, First District.

Brief and Argument for Defendant in Error.

STATEMENT OF FACTS.

In the Circuit Court of Cook county, Illinois, defendant in error (hereafter referred to as the plaintiff) recovered a judgment for $45,000 against plaintiff in error (hereafter referred to as the defendant). The judgment was in an action for injuries to his person, sustained at Peninsula, Ohio, August 23, 1913, and described by the intermediate reviewing court as follows (194 Ill. App. 491, 495-6; Trans. 187):

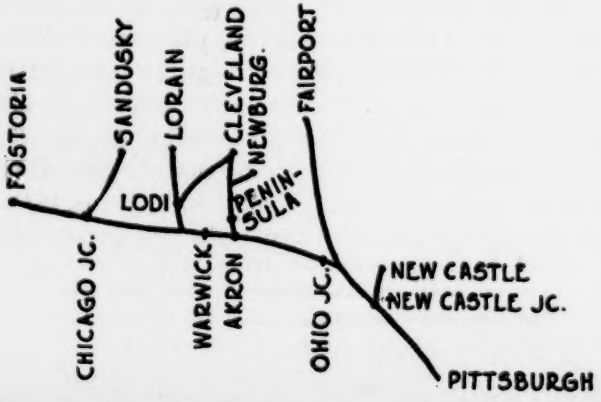
> "His brain was injured, right arm amputated, back broken, vertebrae out of alignment, cartilage between the vertebrae destroyed; ribs, left clavicle and nose were broken; muscles of the

entire right side have since become atrophied; right side of body partially paralyzed; both legs paralyzed, and many other injuries."

An appeal was taken to the Appellate Court of Illinois, First District, where the judgment was affirmed (194 Ill. App. 491), but the defendant did not ask that court to grant it an appeal to the Supreme Court of Illinois. Instead it presented to the latter court a petition for certiorari, which was denied.

This writ of error is to review the decision of the Appellate Court of Illinois, upon the theory that the petition for certiorari having been denied, that court was the highest court of the state to which the case could have been carried. It is in this connection that the failure to pray for a certificate of importance and an appeal is of vital interest.

Plaintiff was employed by the defendant as a freight conductor, and his usual run was from Newcastle Junction, Pennsylvania, which is about 60 miles west of Pittsburgh, to Chicago Junction, Ohio, some 145 miles farther west. A sketch of defendant's road may make the geography more clear, and so it is given here—not true to scale but sufficiently accurate to illumine the matter.



It will be observed that Warwick, Ohio, lies between Akron and Sterling, and that from both these latter towns lines branch off to Cleveland, Ohio, and Peninsula is on the branch from Akron to Cleveland, the length of which is about 25 miles.

The foregoing facts are undisputed, or, being geographical, are indisputable and subject to judicial notice. So we come to the chronology of the plaintiff's work for a period beginning at 2:15 p. m., on August 19, 1913, and ending with his injury at 1:45 a. m., August 23, 1913:

1913

August 19, 2:15 p. m.—Called to go west on No. 13, to meet and relieve a crew coming east (Trans. 27; Rec. 62).

(No. 13 was a mail train, due to leave Newcastle Junction at 4:15 p. m. [Trans. 27; Rec. 62]).

3:40—Reported; had time slip signed; got orders; and prepared to leave (Trans. 27-9; Rec. 63-6).

5:15—Left Newcastle Junction on No. 13, which was an hour late (Trans. 29; Rec. 66).

(His orders were to leave the mail train when notified by its conductor, who, in turn, would be notified by the train dispatcher (Trans. 29; Rec. 67).

6:05—Told to get off at Ohio Junction, Ohio; did so, and took charge of freight train. Was setting out cars, etc. (Trans. 29, 30; Rec. 68).

11:05—Left Ohio Junction (Trans. 30; Rec. 68).

August 20, 2:45 a. m.—Arrived at Newcastle Junction yards, and was called for 4 a. m. In the meantime was making reports, etc. (Trans. 30-1; Rec. 69-71).

4:00—Started west to meet and relieve a crew coming east. Traveled on a freight train (Trans. 31; Rec. 75).

5:15—Ordered off at Ohio Junction to take charge of east-bound freight. Took charge of train and left for Newcastle Junction (*ibid.*)

10:55—Arrived at Newcastle Junction (Trans. 32).

11:40—Completed duties and left yard for home.

12:05 p. m.—Arrived home, had dinner and was preparing for bed (*ibid.*).

2:15—Called for duty and ordered to go west to meet and relieve an east-bound crew at some point to be named by conductor of No. 13 (*ibid.*).

3:15—Reported at yard, did necessary preliminary work and waited for No. 13 (*ibid.*).

5:15—Started west on No. 13 to meet crew when directed (Trans. 32-3).

7:35—Ordered off at Akron Junction, Ohio, to take charge of train there, and did so (Trans. 33).

11:55—Left Akron Junction, after long delay, due to size of train (62 cars), heavy grade, necessity for getting fuel and lack of proper motive power. It took 5 engines to get the train started on the up grade there, and the extras were doled out one at a time.

At Ravenna, Ohio, there were two hot boxes on his train to be cared for.

At Niles Junction, Ohio, met a fast freight, the engine of which had a hot box. Exchanged engines and cared for the disabled engine. At Ohio Junction, Ohio, his train stalled (Trans. 33-4).

August 21, 9:10 a. m.—Arrived at Newcastle Junction, Pennsylvania (Trans. 34).

10:25—Finished making necessary reports, etc., and went home (*ibid.*).

11:15—Arrived at home and had dinner (*ibid.*).

1:00 p. m.—Went to bed (Trans. 35).

Note—This is the first time in bed since 2:15 p. m., August 19, 1913, a period of forty-six and three-quarter hours.

3:00—Called to take a train to Lorain, Ohio (*ibid.*).

Observe the 2 hours' sleep.

4:25—Reported at Newcastle Junction yards, got names of his crew and was busy preparing his train for its departure (Trans. 35-6).

6:30—Left Newcastle Junction in charge of his train (Trans. 36).

August 22, 6:05 a. m.—Arrived at Warwick, Ohio, and was put on a siding (*ibid.*).

10:00—Relieved by crew of another train with instructions to proceed to Cleveland, Ohio. This trip was made in a caboose where there was no place for plaintiff to sleep (Trans. 36-7).

10:35—Left Warwick for Cleveland (*ibid.*).

5:10 p. m.—Arrived at Cleveland, registered and did other necessary things (Trans 38).

6:10—Left yards and went to dinner (*ibid.*).

7:30—Returned to the yards and went to bed, where he slept 2½ hours (*ibid.*).

10:00—Called for Newcastle Junction (*ibid.*).

He was thus ordered to work, though having had but 4½ hours' sleep in 80¼ hours.

August 23, 12:30 a. m.—Having got his train ready, left Cleveland for Newcastle Junction (*ibid.*).

2:00—Completely ruined at Peninsula, Ohio.

A consideration of this chronology shows that during the practically 84 hours from 2:15 p. m., August 19, 1913, until the time of the injury at 2 a. m., August 22, 1913, the only times plaintiff was not hearkening to his master's voice were from 11:40 a. m. to 2:15 p. m., on August 20th, a period of 2½ hours, during which he got no sleep; from 11:15 a. m. to 3 p. m., on August 21st, a period of 3¾ hours, during which he had opportunity for but 2 hours' sleep; and from 6:10 p. m. to 10 p. m. on August 22nd, during which time he slept 2½ hours in the caboose at Cleveland.

Having been kept thus constantly occupied for 84 hours, plaintiff arrived with his train at Peninsula, Ohio, on his way from Cleveland to Newcastle Junction about 2 a. m. on August 23, 1913. While the tracks from Akron, on the main line, to Cleveland, really run north and south, they are, in railroad men's parlance, referred to as east and west. That is, going from Akron to Cleveland one is going west, and on the return one is going east.

As will be more fully explained in a later part of this statement, plaintiff, having arrived at Peninsula, found it necessary to "set out" a car which had a "hot-box," and in doing this he was injured.

This detailed chronology is made necessary by defendant's contention (Brief, p. 12) that "the only question of any violation of the Hours of Service Law is whether plaintiff was relieved on August 22nd at 8:45 a. m. or 10 a. m." The real question is whether defendant's whole course of dealing with plaintiff from 2:15 p. m. on August 19, up until the time of his injury, a period of 84 hours, was not a gross violation of the letter and spirit of the law.

As to the hour when plaintiff was relieved at Warwick, Ohio, on August 22, 1913, the testimony is that plaintiff was with his train on a siding 2 miles west of the station there (Trans. 36; Rec. 80), and his relief crew came on an eastbound passenger train (Trans. 138; Rec. 278). The conductor of the relief crew says this train arrived at Warwick "about 8:40" (Trans. 147; Rec. 295), while Wilson says it passed his train, as it stood on the siding 2 miles west of Warwick, at 8:40 (Trans. 30; Rec. 80). But whether the train arrived in Warwick at 8:40 a. m.

or passed Wilson at that time and took 4 or 5 minutes longer to arrive at Warwick, it is manifest the relief could not have taken place at 8:45 a. m., for the testimony is that Stewart, the relieving conductor, walked out to where Wilson was, at the west end of the siding (Trans. 36; Rec. 81). And the court will take notice of these facts: Stewart first had to find out where Wilson's train was; the walk out there, through the yards, would take nearly half an hour; and then there was work to be done, on records and the like, before Wilson was finally relieved.

The foregoing testimony has been stated with particular reference to the 4th and 5th counts (Trans. 7-11) and the additional count (Trans. 13-15), which are based on the "Hours of Service Law," but the second count (Trans. 5) is based upon the defendant's negligence in maintaining a sidetrack at Peninsula, which was unnecessarily close to its main track, and we turn to the testimony bearing on that count.

Plaintiff's usual run was on the Newcastle division, from Newcastle Junction to Chicago Junction, Ohio (Trans. 26; Rec. 61), and he had been over the Cleveland division, from Sterling, on his own division, to Lorain, Ohio, a distance of some 40 miles (Trans. 26; Rec. 62). Lorain is on the shore of Lake Erie, some distance west of Cleveland; and it is not, nor is it pretended it is on the same branch as is Peninsula.

Plaintiff had last been through Peninsula when he was working as a brakeman, in 1910, but had not been there since the great floods of March and April,

1913 (Trans. 44; Rec. 94-5), except for one trip in July, 1913 (Trans. 42; Rec. 91). These floods are history, their effect on the defendant's tracks is testimony.

Bergdorf, who was section foreman for defendant for 10 years before, and at the time of the floods, and had charge of all its tracks in Peninsula (Trans. 90; Rec. 184), says the tracks were put "out of commission," "they were practically all washed out" (Trans. 91; Rec. 185-6). He goes on to explain that the ballast was washed out, the main track was hanging, and the side tracks washed down against it and against one another. After the recession of the waters he lined the tracks together, and blocking them up so that trains could run over them, and no changes as to distance had been made from that time until he left the defendant's service in August 1913 (the month of the accident), nor had any been made up to the time he testified, so far as his examination showed, up until a day or two before he testified (Trans. 91; Rec. 186-7).

Plaintiff's train consisted of an engine, 5 cars, another engine and his remaining cars (Trans. 41; Rec. 88). There were 39 cars in all (Trans. 94; Rec. 191), together with the caboose. The train stopped on the main track to permit the engines to take water, and Wilson proceeded to care for the hot-boxes. One of these he "fixed up" (Trans. 40; Rec. 87), but the other was of such a nature that he decided to cut the car out of his train. This particular car was about 8 car lengths from the caboose (*Ibid.*), so to get at it Wilson had the head brakeman cut off the cars ahead of the second engine

while he cut off those behind it, then that engine pulled over the switch, and passed down the side-track along the train (Trans. 41; Rec. 88-9).

Apparently the plan was to cut the train just ahead of the "hot box" car, attach the engine to the caboose, and make the switch.

Plaintiff having his lantern, got upon the foot-board at the rear of the engine, and they backed along the train until about 5 or 6 car lengths from the "hot box," when the steam was shut off and the engine "drifted" (Trans. 41, 131; Rec. 89, 265). When it reached the "hot box" the speed was about an ordinary walk (Trans. 41, 152; Rec. 89, 304). Here plaintiff stepped off the running board and almost stepped into eternity.

The distance between the main track and the side track, and the condition of the intervening space is vividly described by the witnesses.

Clearfoss was the brakeman on plaintiff's train, and having the steadiest nerves of any of the crew to him was delegated the task of caring for the injured man (Trans. 109; Rec. 223). His testimony is that the ground was "rough, very uneven; the slag was there, in hills and hollows as near as I can explain it to you, in piles" (Trans. 110; Rec. 224). He had the caboose pulled on to the siding to take plaintiff to Akron, and when going to where the injured man lay had to pass between the engine and caboose on the side track, and the cars on the main track. (*Ibid.*) His experience is perhaps best told in the question and answer form (Trans. 110; Rec. 224-5):

"Q. Did you notice what distance there was between them there?

A. Just this way (indicating), so that I turned my shoulders this way (indicating sideways), when I started to walk in between.

Q. That is, you turned your shoulders sideways?

A. Yes, sir, to clear, so that I would not tear my clothes on anything sticking out on either the car or the engine.

Q. And as you walked you would strike on either the engine or the car—

A. Yes, sir.

Q. — or anything else?

A. No, you would not strike on anything else, but you would probably hit one or the other in the motion of your walk."

Williams, the conductor who was brought from Akron to take charge of plaintiff's train after the accident, says the clearance between a car on the siding and one on the main track was between a foot and two feet (Trans. 94; Rec. 93), and that the ground between the tracks was rough—they had been unloading slag there, and it lay loose (Trans. 95; Rec. 194).

Briggs, the engineer of the engine, on the footboard of which plaintiff took his last journey as a railroad man, says the space between his engine and the train "was not very wide," and that "it was not as wide as it is in some places." As for the ground, he describes it as "kind of rough and uneven" (Trans. 102; Rec. 207).

These three witnesses were in the defendant's service at the time they testified, and their evidence as to conditions at Peninsula at the time of the acci-

dent speaks more convincingly than volumes of field notes made long after the event—or even in the cold, gray light of the morning after.

The clearance between cars, on the Newcastle division, and indeed the usual clearance, is given by plaintiff as about 4 feet, and never less than 3½ feet (Trans. 42; Rec. 90-1). Bergdoff says the standard guage was 13-foot centers—that is 13 feet from the center of the main track to the center of the siding, and the tracks on each 4 feet 8½ inches (Trans. 90; Rec. 184), which leaves a space of 9 feet 3½ inches between the near rails of the siding and the main track. Allowing a 2½-foot overhang on each car, we have the 4-foot clearance plaintiff speaks of.

Williams says that on the Newcastle division, the one on which he and plaintiff ran, the distance from center to center was 14 feet (Trans. 95; Rec. 194). Matthews, a former conductor and brakeman for defendant on the Newcastle & Cleveland divisions, gives the distance between the near rails of siding and main track as 9 feet (Trans. 98; Rec. 199).

Thus it appears the tracks at Peninsula were abnormally close. It is not contended that any change was made in the position of the tracks between the time of the injury and the time the witnesses testified, yet Huber, measuring from the center of one near rail to the center of the other, found that, at the 14th rail from the frog of the north switch, the distance, 6 feet 9 inches, at the end of the 15th rail it was 6 feet 7½ inches, and at the 16th rail, 6 feet

8½ inches. These measurements were taken at or about the scene of the accident, and disclose a scant clearance.

It is not even suggested that plaintiff knew anything about this condition of affairs, the only apparent attempt at a defense to this count being that he knew he was tired and sleepy because of the labor he had been compelled to undergo, and assumed the risk of that condition. How well this comports with the contention that there was no violation of the "Hours of Service Law," is a matter to be taken up elsewhere.

BRIEF AND ARGUMENT.

The facts and law showing the defendant has no standing in this court have been commented upon in the "Suggestions" made in support of the motions to dismiss or affirm, and while that matter will be touched upon later, it seems best to deal first with the merits of the case in reply to defendants' brief and argument.

Since counsel begin and end their point I with the contention that, at the time of his injury, plaintiff was not "at work" (Brief, pp. 21, 30) in violation of the "Hours of Service Act," it will be argued first that, under a proper construction of the act, as applied to this case, he was "on duty." The question of assumed risk will then be taken up and thereafter counsel's argument, as presented, will be followed, and in conclusion the state of the record presented.

I.

AT THE TIME OF HIS INJURY PLAINTIFF WAS ON DUTY IN VIOLATION OF THE "HOURS OF SERVICE ACT."

A reading of the declaration shows that the hours of service counts were drawn upon the theory that the act had been continuously violated from 2:15 p. m. on August 19, 1913, until plaintiff's injury 84 hours later, and the testimony was put in without objection upon this theory.

The "Hours of Service Act" applies to "persons actually engaged in or connected with the movement of any train," and as to them makes it unlawful for the employer to require or permit them to be or remain "on duty" for a longer period than 16 consecutive hours, and commands that they, having been "on duty" for 16 hours continuously, "shall be relieved," and not required or permitted again to go "on duty" until after "at least" 10 consecutive hours "off duty."

The words "on duty" mean more than "at work," and were used advisedly in the statute. In the Congressional Record for January 9, 1907 (to which the court may refer, *Johnson* v. *So. Pac. R. Co.*, 196 U. S. 1, 19), appears a short colloquy between Senators Patterson and Spooner in which the difference between these phrases was pointed out (Vol. 41, Pt. 1, p. 826). The Century Dictionary defines the noun "work" as meaning "active operation." Murray's Dictionary defines the phrase "on duty" as being "engaged in the performance of one's appointed service or task," as "on duty with his regiment," and "off duty" as being "the opposite of this; not officially engaged," while the Century uses an illustration of "on duty" the phrase "the regiment did duty in Flanders."

In *Mo. Pac. Ry. Co.* v. *Mackey*, 33 Kan. 298, 315, HORTON, C. J., after quoting from lexicographers, said:

> "When we speak of duty as applied to a servant or employe, the matter involves his service or business."

This leads to the word "service," and it Murray defines as "the work or duty of a servant; the action of serving a master," while the Century gives its meaning as "the act of service or attendance in any sense; the rendering of duty to another; obedience; the performance of any office or labor for another."

While Wilson was "dead-heading" from Newcastle to Ohio Junction on August 19th and 20th, he was subject to be ordered off at any point which the train dispatcher might indicate to the conductor of the trains on which he rode, and the same is true of his trip from Newcastle Junction to Akron Junction on the 21st (Trans. 29, 31, 33; Rec. 67, 71, 74), and he was under pay. In view of these facts, it would seem idle to contend that he was not "on duty" and serving the defendant, just as much as while he was waiting at Newcastle Junction for the trains to take him out. (*San Pedro L. A. & S. L. R. Co.* v. *United States,* 130 C. C. A. 28, 31; 213 Fed. 326, 329.) To adapt the language of this court in *Missouri K. & T. Ry. Co.* v. *United States,* 231 U. S. 112, 119, he was under orders, liable to be called upon at any moment, and not at liberty to go away. He was none the less on duty when inactive. His duty was to stand and wait.

From a reading of the speech delivered in the senate on January 9, 1907, by Senator La Follette, who was in charge of the bill (Cong. Rec., Vol. 41, Pt. I, pp. 812-3) it may readily be concluded that a man was considered to be "on duty" from the time he is "called" until his final relief. In citing to the senate a few illustrative cases of accidents due to excessive

hours of service, he 20 times dates the expiration of the man's rest from his "call to duty," and in his remarks he twice uses this as the starting point of duty. He does not use any other datum post. And since the senator was reading from reports made by the railroads themselves, it may be inferred that is their idea of when a man's period of duty begins. This portion of the speech is printed as an appendix to this brief, along with the colloquy between Senators Spooner and Patterson.

According to this interpretation, plaintiff's hours of duty began when he was "called" at 2:15 p. m. on August 19th. But if the time when he reported at the yards in Newcastle Junction be taken as the starting point, it will be found he was "on duty" from 3:40 p. m. on the 19th, until 11:40 a. m. of the 20th—a period of 20 hours. He then left the yards for his home. Defendant knew plaintiff lived in Newcastle, and had to take a train between his home and Newcastle Junction (Trans. 50; Rec. 106), a distance of 3 miles (Trans. 113; Rec. 230), so it gave him time to get home and have dinner, before it called him again at 2:15 p. m., less than 3 hours after he had checked in, and less than 2 hours after he got home—but in time to catch the train for Newcastle Junction. Defendant knew this man, who had been on duty for 20 hours, could not have had a wink of sleep.

He reported again at 3:15 p. m. on the 20th, and returned from his run, and turned in his reports at 10:25 a. m. on the 21st, a period of 19 hours and 10 minutes, so defendant knew he had been at work for over 39 hours without sleep, and if the time between his being called and his reporting at the yards be

included, he had been under its orders for 41 hours and 35 minutes, the bondage being broken for 2 hours and 35 minutes—long enough to go home for dinner. Since the time allowed trainmen for meals is not to be deducted in computing the time of service (*United States* v. *C. M. & P. S. Ry. Co.*, 197 Fed. 624, 627; *United States* v. *Chicago & N. W. Ry. Co.*, 219 Fed. 342, 343), it may well be said that, despite defendant permitted plaintiff to leave the yards, and then called him again as soon as he had his dinner—despite this interruption, he was "on duty" the whole 44 hours.

At 10:25 a. m. on August 21st, plaintiff completed his work in connection with turning in his reports, etc., went home again, had dinner, and at 1 p. m. (which was an hour and three-quarters after he got home) he finally got to bed, only to be called again two hours later. This conduct completely corroborates plaintiff's statement (Trans. 53; Rec. 112):

> "I would mark (on the register) for ten hours' rest, but it would not do any good, they would call you right away."

To return to August 21st. At 4:25 p. m., after having been absent from the yards 6 hours, plaintiff reported in obedience to the call, that is he arrived at the yard and walked over to the roundhouse, which took 10 minutes, and there registered. He prepared his train and took it out at 6:30 p. m., arriving at Warwick, Ohio, at 6:05 a. m. on the 22nd. The train was put upon a sidetrack, and plaintiff remained in active charge of it until he turned it over to Stewart. According to plaintiff's testimony this took place at 10 a. m., which

meant a period of 17 hours and 35 minutes from the time he arrived at the yards in Newcastle Junction, or 10 minutes less if the time he put his name on the register be taken as the starting point. Stewart says he relieved plaintiff at 8:45 a. m., but even this leaves him on duty more than 16 hours, at the time Stewart took over the train.

When Stewart took over the train he showed plaintiff a message directing him to take his crew and proceed to Cleveland on that train. As soon as plaintiff turned the train over to Stewart and got his orders, which was beside the engine, he went back to the caboose. In this there were 4 bunks, one of which was broken and filled with drawbars, knuckles and joints, while the other 3 had cushions on them and were occupied by the brakeman, the head brakeman and the fireman of his crew (Trans. 37-8). This made it impossible for plaintiff to lie down, so he made the trip to Cleveland on the rear end of the caboose, and improved his time by learning the road. The train reached Cleveland at 5:10 p. m. (Trans. 38), more than 24½ hours after plaintiff had reported at Newcastle Junction. Plaintiff registered, got his time slips signed and at 6:10 p. m. left the yard for dinner. Returning about 7:30 p. m., he went to bed in the caboose, but was called at 10 p. m., for Newcastle (Trans. 38). Thus he had had 2½ hours' sleep from 3 p. m. the day before, when he was called at his home—a period of 31 hours. He took his train out and 4 hours after he was called he was injured.

During all the time from the hour he reported on August 21st (4:25 p. m. or 4:35 p. m.) until he

was injured, plaintiff was under pay, and subject to the orders of defendant. He was a freight conductor, whose only duties were in and about the movement of freight trains, and he was ordered from Warwick to Cleveland for the purpose of moving a freight train which pulled out of the station a few hours after he got there. Why was he under pay if he was not "on duty"?

He was not free to do as he chose, he was subject to orders, and indeed, might have been ordered off at any point between Warwick and Cleveland to take charge of a train. It seems clear he was "on duty," within the meaning of the "Hours of Service Act." He was "on duty" practically all the time from his "call" at 2:15 p. m. on August 19th until his injury.

The trial court gave the jury the following instruction (Trans. 157):

> "18. The court instructs the jury that railroad employes dead-heading on trains and not required to perform, and not held responsible for the performance of any service or duty in connection with the movement of the train upon which they are dead-heading, are not, while so dead-heading 'on duty' as that phrase is used in the act regulating the hours of labor."

This instruction is practically a verbatim copy of the Interstate Commerce Commission's ruling 74, and, with all due deference to the Commission, it is erroneous. The closing paragraph of the argument on this point (Brief, 30), begins:

> "It is respectfully submitted that the defendant in error was not at work at the time in violation of the Hours of Service Act."

This shows counsel would have the court consider "duty," "service" and "work" as synonyms, which is the basic error of the rule and the instruction.

Of course, the ruling of the Commission is not, and cannot, be binding on the courts in the interpretation of the act. "It is the obvious duty of the court to give effect to what it conceives to be the true construction of the act of congress." (*San Pedro L. A. & S. L. R. Co.* v. *United States*, 136 C. C. A. 343, 351; 220 Fed. 737, 735.) (See also, *United States* v. *Illinois Cent. R. Co.*, 234 Fed. 433, 435; *Osborne's, Admr.* v. *Cincinnati, N. O. & T. P. Ry. Co.*, 187 Ky. 176, 187, cited by defendant.)

The instruction, like the rule, confounds "work" with "duty" and "service." As has been seen the two latter words are practically synonyms, and are very distinct from "work," which implies active operation, while the other two imply a condition which may demand absolute passivity. The policeman held in reserve in the squad-room is "on duty," his fellow traveling his beat, is "at work." So, of the fireman in the engine house, and at a fire, and the soldier in the guard room and on sentry go; and so, of the railroad employe under orders, and the one handling a train.

This confusion of terms appears in the last seven words of the rule, which refer to the statute as "the act regulating the hours of labor," using "labor" as synonymous with the word "service" in the title of the act. They also serve who only "stand and wait."

It appears again in the phrase "not required to perform, and not held responsible for the performance of any services or duties in connection with the movement of the train upon which they are dead-heading." This implies that a man is not "on duty" unless he is actively engaged in the movement of the train—that is "at work"—the very idea rejected in the Senate. In addition, it ignores the plain language of the statute, which defines "employes," within its purview, as being those "actually engaged in or connected with the movement of any train." By the instruction (and the rule) the words "or connected with" are read out of the statute, and the words "service" and "duty" made synonyms of "work."

Applying the instruction and rule to the facts of this case the error becomes glaringly apparent. Plaintiff was "called" to take a train from Newcastle Junction, Pennsylvania, to Lorain, Ohio (Trans. 35; Rec. 78). About midway of his trip he receives an order from his employer, to leave that train and go to Cleveland for the apparent purpose of taking charge of another. Was he not in the "service" of his employer as he rode to Cleveland? If he was not, why was he paid for his time? Had not his employer authority to order him to take charge of a train at any point between Warwick and Cleveland? When he got to Cleveland, was he not still under orders?

The very object of the "Hours of Service Act," was to give the employe a certain period of time when he would be free from the orders of his em-

ployer, and the temptations of his own nature. For, as Senator La Follette pointed out (Cong. Rec. Vol. 41, pt. 1, p. 813):

> "The desire on the part of the railway employe to have a good standing with those who are immediately in authority over him, those who issue the calls for him to go on service, and who have to do directly with his promotion * * * will inevitably force men, even against their will, against their better judgment, to comply with every call that is made."

Here is the key to the provision that it "shall be unlawful" for the employer "to require or permit" the resumption of service without the prescribed time "off duty." Certain it is that the lawmakers never contemplated a condition where a man was "off duty" and at the same time under orders. The intention was to provide for a continuous period of 10 hours (or 8 in some cases) during which the master could not say "come," and the servant had to come, nor say "go," and the servant had to "go." "I say to this man, Go, and he goeth; and to another, Come, and he cometh; and to my servant, Do this, and he doeth it," has its limitations.

While the exact question now presented has never been passed upon, the decisions so far rendered point inevitably to the conclusion here urged —a man is "on duty" from the moment he is "called" until the company releases all right to dictate his movements.

The language of this court in *Missouri, K. & T. Ry. Co.* v. *United States*, 231 U. S. 112, 119, has already been referred to and here we again adapt it

to the case in hand. Plaintiff was under orders, liable to be called at any moment, and not at liberty to go away. He was none the less on duty when inactive. His duty was to stand and wait.

From 2:15 p. m., on August 19, 1913, until his physical ruination at 2 a. m., on the 23rd of that month, the periods when plaintiff was not "under orders," when he was "at liberty to go away," when he did not have to "stand and wait," are given in the record as follows: from 11:40 a. m. to 2:15 p. m. August 20th, and from 10:25 a. m. to 3 p. m. on August 21st, a total of 7 hours and 10 minutes out of 84 hours; and of these he had only 2 for sleep. The time he slept in the caboose at Cleveland (2½ hours) does not count, because he was "on duty," and had to sleep "with one eye open" and "his boots on," as the sayings go.

In *Northern Pac. Ry. Co.* v. *United States,* 136 C. C. A. 200, 202; 220 Fed. 108, 110, affirming 213 Fed. 539, the stipulated facts were that a train crew went "on duty" at 5:30 a. m.; their train was ordered to leave at 6 a. m., but was delayed 45 minutes; at 8:25 a. m. the crew "went off duty at a way station, being dismissed for a definite period, viz., until 10 a. m., as their train was necessarily held up to permit others to pass, during which time the train was placed in charge of a watchman (213 Fed. 540); they returned to duty at 10 a. m. and remained on duty until 11 p. m. If the hour and a half relief at the way-station was to be included in the "hours of service" the act had been violated, otherwise not. In sustaining a conviction under section 3 of the act, the court said:

> "The sole question in the case is whether the temporary release of the crew from duty broke the continuity of its service within the meaning of the statute. We are of the opinion that it did not, and think, that such is the effect of the decision of the Supreme Court in the case of *Missouri, K. & T. Ry. Co.* v. *United States,* 231 U. S. 112; 34 Sup. Ct. 26, 58 L. Ed. 144. The run of the crew was not ended; it remained *the* crew of the train, temporarily relieved because of delays, * * * liable to be called at any moment, and not at all, as said by the counsel for the plaintiff in error, 'at liberty to go away if they wished.'"

So here. The run of plaintiff and his crew was not ended, though temporarily relieved from work, because of the defendant's desires, they were still the crew of a train, liable to be called at any moment, and not at all at liberty to go away if they wished.

It is very evident that in the stipulation in the case cited, the words, "off duty" were used as synonymous with "not at work," but the decision of the Court of Appeals effectually destroyed that illusion, at least so far as the Ninth Circuit is concerned.

In the opinion of the District Court in the case under discussion it is said (213 Fed. 540): "The release was of no benefit to the crew, and could serve no substantial purpose except to obviate the penalty imposed by law." The same may be said of every so-called "release" plaintiff had. The test is not whether a man may sleep if he so desires, it is was he "off duty." If he was not "off duty" the master is liable, though the employe had op-

portunities to and did sleep; if he was "off duty" the master is not liable, though the employe never slept a wink, but spent all his time in some employment other than the master's, or in carousing. Release from control is the thing.

But if it be assumed opportunity to sleep is the thing to be considered, even that was not afforded plaintiff. He was ordered to dead-head, with his crew, to Cleveland on the train he had brought from Newcastle Junction, and in the caboose of this train there were but 3 available bunks. The crew consisted of an engineer, a fireman, two brakemen and plaintiff (Trans. 37). The defendant had furnished a caboose which would permit but 3 of them to sleep. The conductor, being in charge of the train, would naturally and necessarily be the last man to have an opportunity of turning in, so the defendant may fairly be held to have known he had no chance to sleep. At all events it knew two men must go sleepless. Did it comply with the law when it gave plaintiff a chance to stand up and learn the road from Warwick to Cleveland? Did not an honest attempt to comply with the law demand that if plaintiff was ordered from Warwick to Cleveland he be given 10 hours of complete liberty at one point or the other?

In the celebrated case of *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612, 619, this court, in discussing and upholding the "Hours of Service Act" said:

> "If then it be assumed, as it must be, that in the furtherance of its purpose congress can limit the hours of labor of employes engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging

> the period of service through other requirements of the carriers, or by the commingling of duties relating to interstate and intrastate operations."

The case cited denounces just the thing sought to be done in the case at bar. Here is an attempt to prolong "the period of service through other requirements of the carrier." Plaintiff was "called" to take a train from Newcastle Junction, Pennsylvania, to Lorain, Ohio, and when it called him for and sent him on that duty defendant knew the distance to be covered, the schedule to be kept and the work to be done on the way. It knew the train in plaintiff's charge could not reach Lorain within 16 hours of its departure from Newcastle Junction, so it ordered him off that train at Warwick, and "through other requirements" sought to defeat the act and bring to naught the power of congress.

In commenting on this decision in *Northern Pac. Ry. Co.* v. *United States,* 130 C. C. A. 157, 160; 213 Fed. 577, 580, the Circuit Court of Appeals said the conclusion to be drawn from it is, "that the intent of the act was and is to compel rest for each member of the train's crew at the termination of the 16-hour period." The man in the trenches may sleep—he does not rest. The man compelled to stand up on the rear end of caboose neither sleeps nor rests.

The matter is very well put by Judge Baker in *Delano* v. *United States,* 136 C. C. A. 243; 220 Fed. 635, which was a case of a train dispatcher who was worked as such, for 6 hours, and then used for 5½ hours in other capacities. The employer argued that since he might be employed by some theatre as

a ticket seller, or some telegraph company as a lineman, after he ceased to work as a dispatcher, there was no reason why he should not be employed in railroad work not in any way connected with the movement of trains. This argument was held to be subversive of the intent of the act, and to lead to its re-writing so as to include the words within the parenthesis in the following quotation from the opinion (136 C. C. A. 244; 220 Fed. 636):

> "To justify defendants' claim, the statute should read that:
>
> "'No train dispatcher shall be required or permitted to be on duty (as a train dispatcher) for a longer period than nine hours in any twenty-four-hour period (but after he has been relieved as a train dispatcher the carrier may require him to serve as a ticket seller, provided he be given eight consecutive hours off duty.'"

So, in the case at bar. In order to justify defendant's position, the statute must be made to read:

> "It shall be unlawful for any common carrier to require or permit any conductor to be or remain on duty as a conductor of any particular train for a longer period than sixteen consecutive hours, but, when he has been on duty as the conductor of a particular train for sixteen consecutive hours, he may be thereafter continued on duty indefinitely as a conductor at large."

In *United States* v. *Chicago & N. W. Ry. Co.*, 219 Fed. 342, 343, the office hours of certain telegraph operators were 15 hours a day, with 2 hours off for meals, but at meal-times they were subject to call in case a train arrived. Because the operators were always subject to call, it was held they were "on duty" during meal-time, and the company was convicted.

The thing which was determinative in the case just cited was the fact the men were subject to orders—that is "on duty." Except for the two brief visits plaintiff made to his home, when was there a moment during the whole 84 hours that he was not subject to orders?

In *San Pedro, L. & S. L. R. Co.* v. *United States*, 130 C. C. A. 28; 213 Fed. 326, after 16 hours of service the train was tied up, and all the crew, except the fireman, relieved from duty. The fireman was required to watch the engine and keep it alive until another crew arrived to take over the train. Now, it will be observed the fireman was not engaged in running the train, he had nothing to do with and no responsibility for its propulsion, and "it was not intended he should have any responsibility for the movement if occasion arose" (130 C. C. A. 29; 213 Fed. 327). It was held the company was liable for the penalty, the court saying that, while watching, the fireman was "performing a duty in connection with the movement of the train" (130 C. C. A. 31; 213 Fed. 329).

Is the matter not the same here? The fireman was waiting for the train to move (as were the trainmen in *United States* v. *Northern Pac. R. Co.*, 213 Fed. 539, *supra*), while, on his trip from Warwick to Cleveland, plaintiff was waiting to move a train. What is the difference?

In *United States* v. *Chicago, M. & P. S. Ry. Co.*, 195 Fed. 783, 785, this language is used:

> "An employe is on duty when he is at his post in obedience to rules or requirements of his superior, and ready and willing to work whether

> actually at work or waiting for orders. * * * The words 'on duty' seem to have been intelligently chosen."

The only case cited in support of defendant's position that time spent dead-heading is not to be included in the employe's hours of service is *Osborne's Admr.*, v. *Cincinnati, N. O. & T. P. R. Co.*, 158 Ky. 176, 185-8; 164 S. W. 818, 822-3. In that case Osborne had dead-headed from one point to another, under orders, to meet and take over a train. If the time spent dead-heading were to be included in his hours of service there had been a violation of the act, otherwise not. The pith of the decision on this point lies in the following quotation (158 Ky. 187; 164 S. W. 823):

> "In carefully chosen words it (the act) describes an employe as a person who is 'actually engaged in or connected with movement of any train,' and the hours of service feature of the act only apply to such a described person. Manifestly, Osborne was not actually engaged in or connected with the movement of the train on which he was 'dead-heading,' because the uncontradicted evidence is that he had no duties of any kind or character to perform in connection with the movement of this train, and was not charged with any responsibility in relation thereto."

And the court goes on to point out that Osborne could not "have been engaged in or connected with the movement" of the train he was going to meet, because it did not start for some time after he arrived.

The decision is based wholly upon ruling 74 of the Interstate Commerce Commission, which has been

dealt with above, and is subject to the same criticisms. It absolutely nullifies the words "or connected with" so far as trainmen are concerned, and is, in effect, a holding that, as to them, there can be no recovery unless they are "actually engaged in" the movement of a train for more than 16 hours. It is the confounding of "labor" and "work" with "duty" and "service."

If men may be kept dead-heading over the face of the earth, "under orders" and "not at liberty to go away," but compelled to "stand and wait," then the "Hours of Service Act" becomes a legislative Dead Sea apple, and in the words of the Circuit Court of Appeals in *United States* v. *Grand Rapids & I. Ry. Co.*, 140 C. C. A. 177, 180; 224 Fed. 667, 670:

> "If such a practice can be indulged in at all, it is not easy to perceive where legislation is to end and observance of the legislative enactment is to begin."

II.

PLAINTIFF DID NOT ASSUME THE RISK.

If it be true that plaintiff was "on duty" when he was dead-heading from Warwick to Cleveland, there can be no doubt but that the "Hours of Service Act" was violated. The violation was the more gross if, as is believed to be the case, plaintiff's whole service, from the afternoon of August 19, 1913, up to the time of his injury, is to be considered as a unit.

But, however the law may be construed on these points, there was an absolute violation of the act on the trip from Newcastle Junction to Warwick.

By instruction number 19 (Trans. 157), given at defendant's request, the trial court told the jury that if they believed plaintiff was "relieved" at Warwick on August 22nd, at 8:45 a. m., there was no violation of the act.

The evidence is that plaintiff was "called" on August 21st, at 3 p. m., got to Newcastle Junction at 4:25 p. m. (Trans. 35). His call was to leave at 5 p. m. (*Ibid.*), and he was busy and under pay up until his train actually left at 6:30 p. m. (Trans. 36), from 4:25 p. m. to 8:45 a. m. is 16 hours and 20 minutes. It appears that when plaintiff arrived at the Newcastle Junction yards he walked over to the roundhouse to register, which took about 10 minutes (Trans. 113; Rec. 230), making it 4:35 p. m. From then until 8:45 a. m. was a period of 16 hours and 10 minutes, with no dead-heading time included, and so the law was violated.

But, at defendant's instance, the court, by instruction 18, submitted to the jury a pure question of fact —was plaintiff "relieved" at 8:45 a. m., as claimed by defendant, or at 10 a. m., as he testified? On this submission the jury found that 10 a. m. was the hour. So, assuming that turning over the train to another conductor was, under the circumstances, a relief, within the act, the period on duty was at least 17 hours and 15 minutes.

The jury saw and heard the witnesses and had before it the circumstances as to the time the train, with the new crew aboard, passed plaintiff's train as it stood on the siding at Warwick; the distance it had to run to the station; the distance the new crew

had to walk back; and the fact that a delay was necessarily incident to ascertaining the place where the train was which they had to take over. Under these circumstances the issue of fact was submitted to the jury by and under an instruction framed by defendant. Hence there cannot be any complaint that the law was not correctly laid down, and the only thing left is the pure question of fact which is not open here.

In this connection (Brief 29) counsel make an argument to the effect that plaintiff was guilty of contributory negligence, because he went to work in his sleepy condition, which, it is said, he knew and failed to report.

Contributory negligence is not in the case, as a defense, but merely as a thing to be considered in assessing damages. No question as to the amount of the verdict is open here.

Assuming that when speaking of contributory negligence counsel really have in mind, assumption of the risk, the cases they cite may be considered.

Smith v. *A. T. & S. F. Ry. Co.*, 39 Tex. Civ. App. 468; 87 S. W. 1052, arose under a statute of Arizona which prohibited a railroad company from requiring any conductor, etc., who had worked for 16 hours from going on duty or performing any work until he had had 9 hours of rest. The statute did not prohibit the railroad from "permitting" the employe to go to work, as does the "Hours of Service Act." The pith of the decision lies in these words (39 Tex. Civ. App. 471):

> "It may have been a violation of a statute upon the part of appellee, to require appellant

> to work over sixteen hours, unless there was actual necessity for it, and in case others had been injured through the violation of law, appellee would doubtless be held liable, but appellant voluntarily acted with appellee in the violation of the statute, and will be held to have assumed all risks arising from such act."

This seems like an application of the *in pari delicto* rule to the doctrine of assumed risk, and it is clearly against the weight of authority. Besides it is to be observed there was not any statute in Arizona containing any provision similar to section 4 of the Employers' Liability Act of 1908.

Still, apart from statutory declaration that the servant does not assume any risk arising from the master's violation of a statute, the same rule obtains in most of the states, as the necessary corollary of the statute prohibiting the doing of, or commanding refraining from doing a thing by the master. The subject is very exhaustively discussed in *Streeter* v. *Western Wheeled Scraper Co.*, 254 Ill. 244, 248-60. The court there (p. 249) points out that in 14 named states the risk arising from the master's violation of a statute is not assumed, even though there be no statutory declaration to that effect, while in 10 states it is assumed unless there be a statutory provision, and adds:

> "The same contradictory decisions are found in the federal courts in different circuits as in the state courts."

Basing itself (p. 251) upon the decision of TAFT, LURTON AND THOMPSON, J. J., in *Narramore* v. *Cleveland, C. C. & St. L. Ry. Co.*, 37 C. C. A. 499; 96 Fed.

298, the Illinois court fell in line with the majority of the state courts, and pointed out (p. 257):

> "If the employe must assume the risk of the employer's violation of the statute the act is a delusion so far as the protection of the former is concerned. He is in the same condition as before it was passed. He is compelled to accept the employment; he must assume the risk; when he is killed or crippled, he and those dependent on him have no remedy and the law is satisfied by the payment of a fine."

This reasoning disposes of *Schweig* v. *C. M. & St. P. Ry. Co.*, 216 Fed. 750.

Let it be assumed, for the moment, that plaintiff was "off duty" within the meaning of the law during the journey from Warwick to Cleveland, what of it? The law had been constantly violated from the time he was called (or at all events reported) on August 19th until he turned over the train at Warwick on the morning of the 22nd. Now if plaintiff's condition when he went to work at Cleveland, was contributed to by this violation, then he did not assume the risk of that condition.

The only risk he could possibly be said to have assumed was the risk of the more than unusual closeness of the siding to the main track, but it is not suggested in the argument that plaintiff did assume that risk, nor, indeed, would such a suggestion be for a moment tenable in view of the undisputed evidence that plaintiff knew nothing of the unusual conditions at Peninsula.

It may be well to note here that instruction number 16, given at defendant's request (Trans. 157;

Rec. 322), deals with the subject of contributory negligence and concludes as follows:

> "Provided, however, that in case you find, from the evidence, that a violation of the Hours of Service Act contributed to the injury in question, then it is your duty to hold that the plaintiff was not guilty of contributory negligence."

It will be observed the defendant did not say by this instruction that it was necessary the injury should have been "caused" by a violation of the act, but merely that such violation "contributed to" the injury. Nor were the jury told that it was necessary the plaintiff should have been injured while the act was being violated. It was left to the jury as a matter of fact whether the injury was "contributed to" by the violation of the act. They have found it was, and there is ample evidence to sustain the verdict. Knowing the long hours plaintiff had been on duty, the defendant kept him on duty overtime at Warwick, compelled him to ride to Cleveland on a freight train where, as it knew, he had no chance to rest, and then "called" him for duty practically as soon as he arrived.

Above all, defendant's instruction numbered 20 left it to the jury to find whether, when plaintiff left Cleveland, he knew he was not in a fit condition to exercise reasonable care for his own safety, and advised them that if he did know, and because of his condition did not exercise reasonable care for his own safety, the verdict should be not guilty. The verdict was guilty, so it must be assumed the jury found either that when plaintiff left Cleveland

he did not know he was incapable of exercising due care for his own safety, or else that he did exercise it. In either event the fact was found under law of defendant's own making.

This leads to proximate cause.

III.

THERE WAS A PROXIMATE RELATIONSHIP BETWEEN PLAINTIFF'S INJURY AND THE VIOLATION OF THE LAW.

The argument made under POINT II of defendant's brief ignores the principle of the last straw; it ignores the evidence, and it does not fairly represent the record.

From early in the afternoon of August 19th, until the mid-forenoon of the 22nd, plaintiff had been engaged in defendant's business, with practically no rest, with but little more time to himself than enough to go home and get dinner on two occasions. If never before, the "Hours of Service Act" was violated on the trip from Newcastle Junction to Warwick; his train turned over to another crew, plaintiff, under pay, was directed to go to Cleveland, and to do it under circumstances which, as defendant knew, precluded rest; within 5 hours of his arrival in Cleveland he was called again and injured. But, say counsel, we "may not go into the realm of speculation and conjecture and blindly conclude" that had defendant turned over his train 30 minutes earlier he would not have been injured (Brief, p. 32). It may be asked by what right can we go into the same realm and blindly conclude he would have been injured had the law been complied with. Con-

gress set the limit of human endurance at 16 hours —and it stretched the limit—how can it be said what fraction of an hour or a day over that time causes the breakdown? That plaintiff was tired and sleepy is not denied; that his condition was due to defendant's demands cannot be denied; that defendant violated the law at least on the trip from Newcastle to Warwick is established; can defendant be heard to say "show me" that plaintiff would not have been just as sleepy if I had not been a law-breaker?

If counsel's proposition be correct then it must follow that a railroad company might keep a man on duty and at work for 3 days continuously, "call" him again after 10 hours "rest" standing on the rear platform of a caboose, and then, if he is injured immediately after, say "show me" that the 72 hours' labor made him tired!

Section 4 of the Employers' Liability Act of 1908 provides that the doctrine of assumed risk shall not apply if the carrier's violation of a statute enacted for the safety of employes "contributed to the injury" of the employe, and section 3, as to contributory negligence is in like words. How much of a contribution the law-breaking must make is not indicated, whether it forms the whole load, or is only the last straw is immaterial—the question is: Did it contribute?

The question of contribution must, of course, be determined by the jury, under the instructions of the court, and if, in this case, the instructions were not sufficiently definite, defendant cannot complain.

By its instruction numbered 16 (Trans. 156-7; Rec. 322) the court was invited to, and did, submit to the jury the question whether a violation of the statute "contributed to the injury in question," but nothing is said as to whether the extent of the contribution should be great, small, or average. The instruction was in the words of the statute, and that is sufficient.

If, as counsel urge, there is no evidence of any character whatever showing a connection between the violation and the injury, why did they ask the court to submit the matter to the jury as a question of fact? It is true defendant's instruction 27 sought to have the court hold, as a matter of law, that there was not any causal connection between the violation of the act and the injury, but since defendant offered instructions 16 and 27 together, it cannot complain that the court gave 16, and rejected 27, which was contradictory to it. The court's choice was invited by defendant (*Nilson Mach. Co.* v. *Kurtz Auction Co.*, 186 Ill. App. 424, 430; *Pianco* v. *Herbert L. Joseph & Co.*, 188 Ill. App. 555, 557; *Spencer* v. *Standard Roofing Co.*, 163 Ill. App. 301, 309). And having submitted the question whether a violation of the "Hours of Service Act" contributed to the injury as a question of fact, defendant cannot now urge it as a question of law (*Gascoigne* v. *Metropolitan El. Ry. Co.*, 239 Ill. 18, 22; *Chicago T. R. R. Co.* v. *Schmelling*, 197 Ill. 619, 625; *Spring Valley Coal Co.* v. *Robizas*, 207 Ill. 226, 230; *Domando* v. *Parker-Washington Co.*, 163 Ill. App. 158, 161; *Haynes* v. *Century Coal Co.*, 171 Ill. App. 83, 89-90).

As is said in defendant's suggestions in opposition to the motion to dismiss or affirm (p. 10), the proximate connection between plaintiff's injury and his unfitness for duty is clearly established. The question whether the violation of the act contributed to it was, at defendant's request, left to the jury as one of fact. How can it be heard in this court to complain?

IV.

THE EFFECT OF THE HOURS OF SERVICE ACT.

It is urged under Point III of defendant's brief (pp. 37-40) that the act is exclusive of remedies provided by the common law or state statutes, which is true, and from this it is argued the injury must occur while the defendant is in *flagrante delicto*, and that, by the jury being permitted to consider whether the violation on the trip to Warwick contributed to the injury, the doctrine of assumed risk and contributory negligence were eliminated.

As to the first point, it is sufficient to say the Employers' Liability Act contains no such condition, and to read it into the statute would destroy its beneficent purpose, which has been so often declared. The language of the law is plain—if the violation contributes to the injury that is sufficient. If the view suggested by counsel were to be adopted, there could be no recovery in a case where a man had been worked into such a condition of exhaustion that he required 48 hours of rest to restore him, provided he had been given 10 hours' time in which to learn the railroad's track from the rear platform of a caboose!

However the language of the "Hours of Service Act" is that if a man has been worked 16 consecutive hours he must have "at least" 10 consecutive hours off duty. Considering the care with which language is used in this statute, and the minute examination it was subjected to in congress, it is fair to assume the words "at least" are not used as interchangeable with "only."

As to the second point, it is answered by the fact that defendant's instruction 16 (Trans. 156-7; Rec. 322) submitted the question whether the violation of the act contributed to the injury. One cannot complain of his opponent's instructions when his own lay down the same rule of law. *Consolidated Coal Co.* v. *Haenni*, 146 Ill. 614, 621; *Chicago & A. R. R. Co.* v. *Harrington*, 192 Ill. 9, 25; *Flood* v. *Keeley Brew'g Co.*, 175 Ill. App. 441, 444.

V.

THE QUESTIONS ARGUED BY DEFENDANT ARE NOT OPEN.

The first four errors relied upon, and the eighth are not open, because they present no federal question (*Stickney* v. *Kelsey*, 209 U. S. 419, 420). As there said, "They simply allege in various forms" that the court erred. They do not point out a federal right denied.

The sixth error relied on (Brief, 18) is disposed of by the fact that, at the same time defendant submitted its instruction 16. The authorities cited in the suggestions heretofore filed by plaintiff (p. 11) and those cited under POINTS III and IV, *supra*, dispose of this.

Number 5 (Brief, 18) cannot possibly raise any question because there is evidence tending to support both the Hours of Service counts and also that one (the 2nd) based on the construction of the tracks at Peninsula; and assuming contributory negligence and assumption of risk to be in the case, they were questions for the jury. Besides, it was not claimed in the State Supreme Court and is now claimed here that a verdict should have been directed on the 2nd count, so, as pointed out in the original "Suggestions" (p. 10) the right to argue that, as a matter of law, there was no liability shown under that count, is waived.

As to the 7th error relied on (Brief, 19) that is plainly untenable because defendant, by its instruction 16, submitted to the jury the very question submitted by plaintiff's number 1, viz., Did the violation of the Hours of Service Act contribute to the injury?

The condition of the record is fully discussed in plaintiff's Suggestions in support of his motion to dismiss or affirm, and to them we refer the court.

There being not only no question open here, but no error in the record, it is submitted there should be an affirmance, if not a dismissal of the writ.

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